



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2017-0642; FRL-9974-02-Region 4]

Air Plan Approval; AL; Section 128 Board Requirements for Infrastructure SIPs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a State Implementation Plan (SIP) submission, submitted by the State of Alabama, through the Alabama Department of Environmental Management (ADEM), on October 24, 2017. This submission addresses the Clean Air Act (CAA or Act) requirements applicable to Alabama state boards or agency personnel with respect to the approval of permits or enforcement orders. The submission also specifically addresses requirements for implementation of the following national ambient air quality standards (NAAQS): 1997, 2006, and 2012 Fine Particulate Matter (PM_{2.5}), 2008 8-hour Ozone, 2008 Lead, 2010 Nitrogen Dioxide (NO₂), and 2010 Sulfur Dioxide (SO₂). The CAA requires that each state adopt and submit a SIP for the implementation, maintenance and enforcement of each NAAQS promulgated by EPA. Whenever EPA promulgates a new or revised NAAQS, the CAA requires the state to make a new SIP submission establishing that the existing SIP meets the various applicable requirements, or revising the SIP to meet those requirements. This type of SIP submission is commonly referred to as an “infrastructure” SIP. In this proposed action, EPA is proposing to approve the October 24, 2017, submission with respect to: (1) the requirements applicable to state boards of the CAA; and (2) the related state board infrastructure SIP requirements for the 1997, 2006, and 2012 PM_{2.5}, 2008 8-hour Ozone,

2008 Lead, 2010 NO₂, and 2010 SO₂ NAAQS. In addition, EPA is proposing approval of ADEM's December 9, 2015, infrastructure SIP submission (as supplemented by the October 24, 2017 submission) related to the state board requirements for the 2012 PM_{2.5} NAAQS. If this proposed approval action is finalized, EPA will no longer be required to promulgate a federal implementation plan (FIP) to address these CAA state board requirements for Alabama, as described in more detail below.

DATES: Comments must be received on or before [insert date 30 days after date of publication in the Federal Register].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2017-0642 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Nacosta C. Ward, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics

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SUPPLEMENTARY INFORMATION:

I. Background

By statute, states are required to have SIPs that provide for the implementation, maintenance, and enforcement of the NAAQS. States are further required to make a SIP submission meeting the applicable requirements of sections 110(a)(1) and (2) within three years after EPA promulgates a new or revised NAAQS.¹ EPA has historically referred to this type of SIP submission as “infrastructure SIP” submissions. Sections 110(a)(1) and (2) require states to address basic SIP elements such as for monitoring, basic program requirements, and legal authority that are designed to assure attainment and maintenance of the newly established or revised NAAQS. More specifically, section 110(a)(1) provides the procedural and timing requirements for infrastructure SIP submissions. Section 110(a)(2) lists specific elements that states must meet to satisfy the “infrastructure” SIP requirements related to a newly established or revised NAAQS. The contents of an infrastructure SIP submission may vary depending upon the data and analytical tools available to the state, as well as the provisions already contained in the

¹ EPA has long noted that a literal reading of the statutory provision to meet all requirements of 110(a)(2) on the schedule provided in 110(a)(1) would create a conflict with the nonattainment provisions in part D of Title I of the CAA, which specifically address nonattainment area SIP requirements. See, e.g., “Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2),” Memorandum from Stephen D. Page, September 13, 2013 at 4. For example, section 110(a)(2)(I) pertains to nonattainment SIP requirements and part D addresses when attainment plan SIP submissions to address nonattainment area requirements are due. The provisions in section 172(b) for submission of such plans for nonattainment areas differ from the timing requirements for an infrastructure SIP submission under 110(a)(1). Thus, rather than applying all the stated requirements of section 110(a)(2) in a strict, literal sense, EPA has determined that certain provisions like 110(a)(2)(I) of section 110(a)(2) are not applicable to infrastructure SIP submissions.

state's existing EPA approved SIP at the time when the state develops and submits the infrastructure SIP submission for a new or revised NAAQS.

This action pertains to one of the requirements of section 110(a)(2) that is relevant in the context of a state's development, and EPA's evaluation of, infrastructure SIP submissions. Section 110(a)(2)(E)(ii) of the CAA requires states to have SIPs that contain provisions that comply with certain specific requirements respecting state boards or bodies or heads of state agencies provided in CAA section 128. Section 128 of the CAA requires that states include provisions in their SIP that (1) require that any state board or body which approves permits or enforcement orders shall have a majority of members who represent the public interest and do not receive a significant portion of their income from parties subject to permits or enforcement (section 128(a)(1)); and (2) require that the members of any such board or body, or the head of an executive agency with similar power to approve permits or enforcement orders under the CAA, shall also be subject to adequate conflict of interest disclosure requirements (section 128(a)(2)).

Alabama previously made infrastructure SIP submissions for a number of recently revised NAAQS. With the exception of the state board requirements of section 110(a)(2)(E)(ii) of the CAA, EPA has already approved or will consider in separate actions all other elements of Alabama's infrastructure SIP submissions related to the 2008 8-hour Ozone, 2008 Lead, 2010 NO₂, 2010 SO₂, and 1997, 2006, and 2012 PM_{2.5} NAAQS. At the time of those infrastructure SIP submissions, however, the Alabama SIP did not include provisions to meet the requirements of section 128, and thus these submissions did not meet the requirements of section 110(a)(2)(E)(ii) of the CAA. Therefore, EPA took final action to disapprove Alabama's infrastructure SIP submissions as they pertained to the conflict of interest requirements of section

128 and section 110(a)(2)(E)(ii), for the 1997 and 2006 PM_{2.5} NAAQS on October 15, 2012 (77 FR 62449), the 2008 8-hour Ozone NAAQS on April 2, 2015 (80 FR 17689), the 2008 Lead NAAQS on October 9, 2015 (80 FR 61111), the 2010 NO₂ NAAQS on November 21, 2016 (81 FR 83142), and the 2010 SO₂ NAAQS on January 12, 2017 (82 FR 3637). Under section 110(c)(1)(B), these disapprovals started a two-year clock for EPA to promulgate a FIP to address the deficiency. EPA did not take action on this element for the 2012 PM_{2.5} NAAQS.²

In order to address the requirements of section 128, and thus the requirements of section 110(a)(2)(E)(ii), Alabama made the October 24, 2017, SIP submission to revise the existing SIP in order to include the necessary SIP provisions. Through this action, EPA is proposing approval of Alabama's SIP revision to incorporate into its SIP certain regulatory provisions to address the state board requirements of section 128. More detail on how Alabama's SIP revision meets these requirements is provided below. As a result of the addition of these new SIP provisions to meet the requirements of section 128, EPA is also proposing approval of this submission as satisfying the section 110(a)(2)(E)(ii) infrastructure element for the 1997, 2006 and 2012 PM_{2.5}, 2008 8-hour Ozone, 2008 Lead, 2010 NO₂, and 2010 SO₂ NAAQS. The approvals proposed herein would fully address the SIP deficiencies from EPA's prior disapprovals for the 1997 and 2006 PM_{2.5} NAAQS on October 15, 2012 (77 FR 62449), 2008 8-hour Ozone NAAQS on April 2, 2015 (80 FR 17689), 2008 Lead NAAQS on October 9, 2015 (80 FR 61111), 2010 NO₂ NAAQS on November 21, 2016 (81 FR 83142), and 2010 SO₂ NAAQS on January 12, 2017 (82 FR 3637). Thus, if EPA finalizes this proposed approval, this will resolve the prior disapprovals for element 110(a)(2)(E)(ii) for the 1997 and 2006 PM_{2.5} NAAQS, the 2008 Ozone NAAQS, the

² ADEM submitted its infrastructure SIP for the 2012 PM_{2.5} NAAQS on December 9, 2015.

2008 lead NAAQS, the 2010 NO₂, and the 2010 SO₂ NAAQS, and terminate EPA's FIP obligation with regard to that element for these NAAQS.

A brief background regarding each NAAQS relevant to this action is provided below. For comprehensive information on these NAAQS, please refer to the Federal Register rulemakings cited below.

a. 1997 and 2006 PM_{2.5} NAAQS

On July 18, 1997 (62 FR 36852), EPA established an annual PM_{2.5} NAAQS at 15.0 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) based on a 3-year average of annual mean PM_{2.5} concentrations. At that time, EPA also established a 24-hour NAAQS of 65 $\mu\text{g}/\text{m}^3$. *See* 40 CFR 50.7. On October 17, 2006 (71 FR 61144), EPA retained the 1997 annual PM_{2.5} NAAQS at 15.0 $\mu\text{g}/\text{m}^3$ based on a 3-year average of annual mean PM_{2.5} concentrations, and promulgated a new 24-hour NAAQS of 35 $\mu\text{g}/\text{m}^3$ based on a 3-year average of the 98th percentile of 24-hour concentrations. States were required to submit infrastructure SIPs to EPA no later than July 2000 for the 1997 annual PM_{2.5} NAAQS, and no later than October 2009 for the 2006 24-hour PM_{2.5} NAAQS.

b. 2008 8-hour Ozone NAAQS

On March 27, 2008, EPA promulgated a revised NAAQS for ozone based on 8-hour average concentrations. EPA revised the level of the 8-hour ozone NAAQS to 0.075 parts per million. *See* 77 FR 16436. States were required to submit infrastructure SIP submissions for the 2008 8-hour Ozone NAAQS to EPA no later than March 2011.

c. 2008 Lead NAAQS

On November 12, 2008 (75 FR 81126), EPA issued a final rule to revise the Lead NAAQS. The Lead NAAQS was revised to 0.15 $\mu\text{g}/\text{m}^3$. States were required to submit

infrastructure SIP submissions to EPA no later than October 15, 2011, for the 2008 Lead NAAQS.

d. 2010 NO₂ NAAQS

On February 9, 2010 (75 FR 6474), EPA established a new 1-hour primary NAAQS for NO₂ at a level of 100 parts per billion (ppb), based on a 3-year average of the 98th percentile of the yearly distribution of 1-hour daily maximum concentrations. States were required to submit infrastructure SIP submissions for the 2010 NO₂ NAAQS to EPA no later than January 2013.

e. 2010 SO₂ NAAQS

On June 22, 2010 (75 FR 35520), EPA promulgated a revised primary SO₂ NAAQS to an hourly standard of 75 ppb based on a 3-year average of the annual 99th percentile of 1-hour daily maximum concentrations. States were required to submit infrastructure SIPs for the 2010 1-hour SO₂ NAAQS to EPA no later than June 22, 2013.

f. 2012 PM_{2.5} NAAQS

On December 14, 2012, EPA revised the primary annual PM_{2.5} NAAQS to 12.0 µg/m³. *See* 78 FR 3086 (January 15, 2013). An area meets the standard if the three-year average of its annual average PM_{2.5} concentration (at each monitoring site in the area) is less than or equal to 12.0 µg/m³. States were required to submit infrastructure SIP submissions for the 2012 PM_{2.5} NAAQS to EPA no later than December 14, 2015.

II. What Is EPA's Analysis of How Alabama Addressed the State Board Requirements of Section 128?

On October 24, 2017, Alabama submitted a SIP submission to include SIP provisions to address the requirements of CAA section 128, and thereby to meet the related infrastructure SIP

requirements of section 110(a)(2)(E)(ii). The October 24, 2017, SIP submission includes changes to rules 335-1-1-.03 and 335-1-1-.04 of ADEM's Administrative Code for Division 1 to incorporate into Alabama's SIP certain conflict of interest provisions that apply to the boards, bodies and executive agency personnel with approval authority for CAA permits and enforcement. Rule 335-1-1-.03, *Organization and Duties of the Commission*, is amended to include language for incorporation into the SIP mandating that members of the Alabama Environmental Management Commission (EMC) meet all requirements of the state ethics law and the conflict of interest provisions of applicable Federal laws, which includes section 128. Rule 335-1-1-.04, *Organization of the Department* is amended to include language for incorporation into the SIP mandating that the ADEM Director, Deputy Director, Division Chiefs, and all ADEM personnel meet all requirements of the state ethics law and the conflict of interest provisions of applicable Federal laws, which includes section 128. ADEM and the EMC are the entities that have the authority to issue and approve CAA permits and enforcement orders. The ADEM Air Director has the authority to approve permits and enforcement orders for Alabama. In the case of appeal, permits and enforcement orders are sent to the EMC and the EMC has final approval authority.

If a state has a board or body that approves CAA permits or enforcement orders, section 128(a)(1) requires that a majority of such board or body represent the public interest and not derive a significant portion of income from persons subject to such permits and enforcement orders.³ Under section 128(a)(2), the members of any such board or body, or the head of an

³ EPA's September 13, 2013, memorandum entitled "Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2)" provides that SIPs are only required to meet the section 128(a)(1) majority requirements if the state has a multi-member board or body with CAA permit or order approval authority.

executive agency with similar power to approve permits or enforcement orders under the CAA, are required to disclose any potential conflict of interest adequately.

In 1978, EPA issued guidance recommending potential ways that states might elect to meet the requirements of section 128, including suggested interpretations of key terms.⁴ In this guidance, EPA recognized that states may have a variety of procedures and special concerns that may warrant differing approaches to implementation of section 128 and made clear that the guidance does not create a requirement that all SIPs must include the suggested definitions verbatim, or that definitions per se must be included in SIPs. EPA provided further guidance with respect to these statutory requirements in its 2013 infrastructure guidance.⁵ In the 2013 guidance, EPA clarified that provisions to implement section 128 need to be contained within the SIP. Therefore, EPA will not approve an infrastructure SIP submission that addresses the requirements of section 128 only by providing a narrative description or references existing state laws or requirements that are not contained within the SIP. EPA has also provided certain interpretations of the statutory requirements of section 128 in its actions on infrastructure SIP submissions from various states, based on the facts and circumstances of those actions.⁶ In several actions, EPA has approved state law requirements that closely track or mirror the explicit statutory language of section 128.⁷

⁴ “Guidance to States for Meeting Conflict of Interest Requirements of Section 128,” Memorandum from David O. Bickart, Deputy General Counsel, to Regional Air Directors, March 2, 1978.

⁵ “Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2),” Memorandum from Stephen D. Page, September 13, 2013.

⁶ *Id.* at 43-44.

⁷ *See, e.g.*, EPA proposed rule on Montana’s SIP/infrastructure requirements, 81 FR 4225, 4233, finalized at 81 FR 23180; EPA’s final approval of Georgia’s infrastructure requirements, 77 FR 65125, proposed at 77 FR 35909.

The legislative history of the 1977 amendments to the CAA also indicates that states have some flexibility to determine the specific provisions needed to satisfy the requirements of section 128, so long as the statutory requirements are met.⁸ Also, section 128 explicitly provides that states may adopt any requirements respecting conflicts of interest for such boards or bodies or heads of executive agencies, or any other entities which are more stringent than the requirements of paragraphs (1) and (2), and that the Administrator shall approve any such more stringent requirements submitted as part of an implementation plan.

EPA is proposing to approve Alabama's October 24, 2017 SIP submission as meeting the requirements of section 128 because we believe it complies with the statutory requirements and is consistent with EPA's guidance. The State has submitted certain regulatory provisions for incorporation into its SIP, and these provisions explicitly require the EMC and ADEM personnel with CAA permit or order approval authority to comply with applicable federal conflict interest laws and regulations. As explained in the submission, these provisions encompass the majority composition and income requirements of section 128(a)(1) for the multi-member EMC and the conflict of interest disclosure requirements of section 128(a)(2) for both the EMC members and the ADEM Director and designees.

As noted above, EPA has determined that state requirements that closely track or mirror the section 128 requirements satisfy CAA requirements. Likewise, EPA believes state law provisions that cross reference or incorporate these federal conflict of interest requirements satisfy the requirements of the CAA. With the incorporation of these specific regulatory

⁸ Specifically, the conference committee for the 1977 amendments stated that "it is the responsibility of each state to determine the specific requirements to meet the general requirements of [section 128]." H.R. Rep. 95-564 (1977), reprinted in *Legislative History of the Clean Air Act Amendments of 1977*, 526-527 (1978).

requirements to comply with the relevant CAA requirements into the SIP, EPA believes that Alabama will meet the requirements of section 128 of the CAA.

III. What Is EPA's Analysis of How Alabama Addressed the Requirements of Section 110(a)(2)(E)(ii)?

The State also specifically submitted the October 24, 2017, submission to address the infrastructure requirements of section 110(a)(2)(E)(ii), and the related section 128 requirements, for the 1997, 2006, and 2012 PM_{2.5}, 2008 8-hour Ozone, 2008 Lead, 2010 NO₂, and 2010 SO₂ NAAQS. Section 110(a)(2)(E)(ii) of the CAA requires states to have SIP provisions that comply with the requirements of CAA section 128. Because EPA is proposing to approve provisions into Alabama's SIP to meet the requirements of section 128 as discussed above, it is also proposing to approve the SIP submission with respect to the related requirements of section 110(a)(2)(E)(ii) for the NAAQS previously mentioned. EPA notes that section 128 is not NAAQS-specific, and thus once a state has met the requirements of section 128 it will continue to do so for purposes of future NAAQS, unless the state makes any changes to the approved SIP provisions, in which case the changed provisions may require further evaluation to ensure that they still meet the requirements of section 128.

For the 2012 PM_{2.5} NAAQS, ADEM submitted an infrastructure SIP submission on December 9, 2015, to address the state board requirements of section 110(a)(2)(E)(ii). EPA has already approved, or will consider in separate actions, all other infrastructure SIP elements for the 2012 PM_{2.5} NAAQS, but has not taken any prior action on the December 9, 2015 submission for section 110(a)(2)(E)(ii). With the SIP revision to address sections 128 and 110(a)(2)(E)(ii) in

the December 24, 2017 submission, EPA is proposing to approve the December 9, 2015 submission for purposes of section 110(a)(2)(E)(ii) in this action.

IV. Incorporation by Reference

In this rule, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference ADEM's Rule 335-1-1-.03, *Organization and Duties of the Commission* and Rule 335-1-1-.04, *Organization of the Department*, effective December 8, 2017, which revise Alabama's SIP to include language that mandates members of the Alabama Environmental Management Commission and the ADEM Director, Deputy Director, Division Chiefs and all ADEM personnel meet all requirements of the state ethics law and the conflict of interest provisions of applicable Federal laws and regulations. EPA has made, and will continue to make, these materials generally available through www.regulations.gov and/or at the EPA Region 4 office (please contact the person identified in the "For Further Information Contact" section of this preamble for more information).

V. Proposed Action

As described above, EPA is proposing to approve that Alabama's SIP meets the state board requirements of 128 of the CAA, and is proposing to approve that the Alabama SIP meets the requirements for the section 110(a)(2)(E)(ii) for the 2012 PM_{2.5} NAAQS. In this action, EPA is also proposing to conclude that, if Alabama's October 24, 2017, SIP revision is approved, the section 110(a)(2)(E)(ii) requirements are met for the 1997 and 2006 PM_{2.5}, 2008 8-hour Ozone, 2008 Lead, 2010 NO₂, and 2010 SO₂ NAAQS. Consequently, if EPA finalizes approval of this action, the deficiencies identified in the previous partial disapprovals of Alabama's infrastructure

SIP submissions related to the state board requirements for the 1997 and 2006 PM_{2.5}, 2008 8-hour Ozone, 2008 Lead, 2010 NO₂, and 2010 SO₂ NAAQS will be cured.

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. This action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866.
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: January 25, 2018.

Onis “Trey” Glenn, III
Regional Administrator,
Region 4.

[FR Doc. 2018-02146 Filed: 2/7/2018 8:45 am; Publication Date: 2/8/2018]